United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

74-1011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JESSE PEARSON,

Appellant.

Docket No. 74-1011

B
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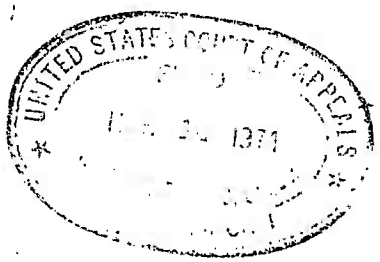
APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
606 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

PAGINATION AS IN ORIGINAL COPY

CRIMINAL DOCKET

JUDD, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	
THOMAS BUTTAFUOCO,	
JESSIE PEARSON,	
ANTHONY POLITO and	
PATRICK RAYLL	
	For Defendant: RAYLL: H.E. WALES
	747-3[illegible] ~~299 Broadway~~, N.Y.C
	421-1993 ~~(227-3830)~~
Sale or receipt of stolen goods.	

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED			
			DATE	NAME	RECEIVED	DISBURSED
Fine, Buttafuoco	1,000	00	12-28-73	Notice of Appeal (No fee)		
~~Fine~~ *Clerk,* Polito	2,500	00	1-2-74	Paid to Treas. (Fine)		5 -
Marshal, Pearson	1,000	00	12/28/73	Notice of Appeal (No fee)		
Attorney,				Rayll		
Commissioner's Court,			12/28/73	Notice of Appeal (No fee)		
Witnesses,				Pearson		
			1-7-74	Notice of Appeal (Rayll) (No fee)	5 -	
			1-8-74	Paid to Treas.		5 -

DATE	PROCEEDINGS
3/8/73	Before COSTANTINO, J.- Indictment filed
3/16/73	Before ROSLING, J.- Case called- Defts present-Only deft RAYAL not presen but his atty is present-Bench Warrant ordered for RAYLL-Defts BUTTAFUOCO, PEARSON and POLITO arraigned and enter pleas of not guilty-Bail cont'd as to all defts-Case marked ready and passed-Motions to be made on statuatory time.
3/17/73	Notice of Readiness for Trial filed.
3-21-73	Magistrate's files 72 M 1774 and 73 M 393, and 73 M 401 inserted into Cr file.
3/26/73	Petition ~~XX~~ for Writ of Habeas Corpus Ad Prosequendum filed. (RAYLL)
3/26/73	By ROSLING, J.- Writ issued , ret. 3/30/73.
3/30/73	Notice of Appearance filed.
3/30/73	By ROSLING, J.- Order filed, appointing counsel.

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73CR 244

DATE	PROCEEDINGS
3/30/73	Before ROSLING, J.- Case called- Deft present and without counsel-Court court assigned H.E. WALES as counsel for deft RAYLL-Order appointing cou signed-Copies given to the atty-Deft arraigned and enters a plea of not Statuatory time for motions-Bail fixed at $10,000.00 cash or surety-Case marked ready and passed.
4/3/73	Writ retd andfiled. Executed. (BUTTAFUOCO)
4/9/73	Notice of Motion for Discovery and inspection-Rule 16 FRCRP filed, Notic Motion to suppress evidence illegally obtained-Rule 41, FRCRP filed, Not of Motion for Bill of Particulars Rule 7 filed, all motions ret.4/13/73
4/11/73	Affidavit of Service filed (for motions of 4/9/73) from LILLIAN KURTZER.
5/4/73	Before JUDD, J.- Case clled-Deft PEARSON present w/o counsel-All other de not present-Order appointing counsel signed-Pre-Trial held and concluded Case adjd to 9/5/73 for Suppression-Hearing and to 9/10/73 for trial.
5/4/73	By JUDD, J.- Order appointing counsel filed. (for J. PEARSON)
8-3-73	Govts answers to Demands for Particulars and Discovery filed. (P.RAYLL)
8/3/73	Letter from chambers dated 8/3/73 from H. Elliot Wales, filed- re: P. RAYL
8/8/73	By, JUDD,J.- Order filed reducing bail to $5,000 surety bond(copies sent AUSA Schlam andcounsel) Deft. RAYLL
9-17-73	Before Judd J - Case called - defts & counsels present - adjd to 9-24-73 for trial.
9-24-73	Before Judd J - Case called - defts & counsels present - Wade Hearing begun - all motions to suppress argued. - wade hearing concluded - Decision Reserved - all other suppression motions denied - trial ordered and Begun. Jurors selected and sworn - Govt opens - All defts open - 2nd Wade Hearing Begun - All Wade Hearing motions to suppress are denied - Trial continued to 9-25-73.
9-25-73	Before Judd J - Case called - defts & counsels present - trial resumed - Stipulation read into Record - Govt rests - defts motion to dismiss the Indictment - all motions denied - Trial contd to 9-26-73.
9/26/73	Before JUDD,J.- Case called- Defts and counsel present-Trial resumed-Juror #6 excused-Deft BUTTAFUOCO rests-Deft POLITO rests-Deft PEARSON rests-Deft RAYLL rests-Govt opens on Rebuttal-Trial cont;d to 10/1/73
10/1/73	Magistrates file 73M1231 inserted into Criminal file 73CR244
10/1/73	Before JUDD,J.- Case called- Defts and counsel present- Trial resumed- Deft Pearson's motion to adjd trial for 1 day in order to find a potential witness- Motion granted- Trial contd to 10/2/73

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73 CR-244
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DATE
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11-21-7
12-28-7

D. C. 10

73 CR-244

CRIMINAL DOCKET

DATE	PROCEEDINGS
10-2-73	Before JUDD, J - Case called - defts & counsels present - Trial resumed - defts motions to dismiss and for Judgments of Acquittal - Motions denied - defts sum up - Govt sums up - deft RAYLL's motion for mistrial - motion denied - Juxdge charges Jury - Marshals sworn - alternate discharged - Jury retires to deliberate at 2:45 PM - Case adjd to Oct. 3, 1973.
10-3-73	Before JUDD, J - Case called - defts & counsels present - Trial resumed - Jury resumes deliberations at 9:30 am. Order of Sustenance signed - Jury returns at 5:00 PM and renders verdict of guilty as charged as to all defts - Jury discharged - Trial concluded - Defts motions to set aside verdict - Motions denied - Bail contd as to all defts - adjd without date for sentencing.
10-3-73	By JUDD, J - Order of Sustenance filed.
10-3-73	5 Stenographers transcripts filed (pgs 1 to 618)
10/5/73	Memo To U.S. Marshal from Judge Judd and reply on back of memo filed re:Buttafuoco
10-11-73	Voucher for compensation of counsel filed (RAYLL) & affidavit in support etc.
10-11-73	2 stenographers transcripts filed one dated Oct. 2 and one dated Oct. 3, 1973 (pgs 619 to 799)
11-21-73	Voucher for expert services filed (RAYLL)
12-28-73	Before JUDD,J.- Case called- Defts and counsels present- Deft POLITO sentenced to imprisonment for a period of 2½ years. The deft is fined $2,500.00 and execution of sentence is stayed pending appeal Deft advised of his right to appeal- Bail conditions contd- Deft BUTTAFUOCO sentenced to imprisonment for a period of 2 years- Deft to serve 6 months and execution of balance of sentence is suspended and the deft is placed on probation for a period of 2 years- deft is fined $1,000.00 and execution of sentence is stayed pending appeal- deft advised of right to appeal- Bail conditions contd- Deft RAYLL sentenced to imprisonment for a period of 4 years pursuant to T-18 U.S.C. Sec. 4208(a)(1) with eligibility for parole after 1 year- deft contd on $2,500.00 bail pending appeal- Clerk to file notice of appeal in forma pauperis on behalf of deft- Deft to post new bail bond by 1-2-74- Deft PEARSON sentenced to imprisonment for a period of 1 year deft to serve 60 days on 3 day weekends and balance of sentence is suspended and the deft is placed on probation for a period of 2 years deft is fined $1,000.00 and execution of sentence is stayed pending

D. C. 109

DATE	PROCEEDINGS
	appeal- Deft advised of right to appeal and Clerk to filed notice of appeal in forma pauperis on behalf of deft- Bail conditions contd
2-28-73	Judgment and Commitment and Orders of Probation filed- certified copies to Marshal and Probation(BUTTAFUICI AND PEARSON)
2-28-73	Judgment and Commitment filed- certified copies to Marshal(POLITO AND RAYL
2-28-73	Notice of appeals filed (RAYLL, POLITO AND PEARSON)
2-28-73	Docket entries and duplicate of notice of appealsmailed to Court of Appeal (RAYLL, POLITO AND PEARSON)
1-7974	Notice of Appeal filed(BUTTAFUOCO)
1-7-74	Docket entries and duplicate of Notice mailed to C of A with Form A (BUTTAFUOCO)
1-10-74	3 Orders received from the Court of Appeals and filed that records be docketed on or before 1-27-74(BUTTAFUOCO, POLITO AND PEARSON)

A TRUE COPY
ATTEST: [illegible]
BY [illegible]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

73 CR 244

UNITED STATES OF AMERICA

-against-

THOMAS BUTTAFUOCO,
JESSIE PEARSON,
ANTHONY POLITO, and
PATRICK RAYLL,

Defendants.

- - - - - - - - - - - - - - - - - - - -X

IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
MAR 8 - 1973
TIME A.M.....
P.M.....

INDICTMENT

Cr. No.
(T. 18 U.S.C. §2315 and §2).

THE GRAND JURY CHARGES:

In or about August, 1972, in the Eastern District of New York, the defendants:

THOMAS BUTTAFUOCO
JESSIE PEARSON
ANTHONY POLITO and
PATRICK RAYLL,

together with Ira Kirschner, not named as a defendant herein, wilfully and unlawfully received and concealed a quantity of stolen Colgate-Palmolive articles, of a value of approximately One Hundred and Ten Thousand Dollars ($110,000.00), which articles were moving as a part of and constituted interstate commerce from Elizabeth, New Jersey to Plainview, New York, knowing the same to have been stolen. (Title 18 United States Code, Section 2315 and Section 2).

A TRUE BILL.

Thomas D Hall
FOREMAN.

Robert A Morse USAS
UNITED STATES ATTORNEY

JB:pc
take 1/1

A F T E R N O O N S E S S I O N

(2:00 o'clock P.M.)

(The following took place in the absence of the jury:)

THE COURT: All right, we are all ready. I think we will bring the jury in.

(Whereupon, the jury entered the courtroom.)

THE COURT: Mr. Schlam and counsel for the defendant, Mr. Rodner and ladies and gentlemen of the jury:

Now that you have heard the evidence and the arguments of counsel, it's my duty to give you the instructions of the Court as to the law that applies to the case. I will put it together from a lot of written papers so as to be as accurate as I can be.

My practice first is to describe the general principles that apply to all criminal trials, then the nature of the charge in this case, and the specific rules of law which apply to them and to the evidence that you have heard, and then something about the evidence and something about how to go about reaching a verdict.

It is your duty as jurors to follow the

law as I state it and to apply the rules of law that I give to the facts as you find them from the evidence. You are the sole judges of the facts. Whatever counsel have stated, and even whatever I state in my instructions, is not binding on you. It's your recollection and your decision that governs.

You are to perform your duty without bias or prejudice for or against any party. The law doesn't permit jurors to be governed by sympathy or prejudice or public opinion.

At the start the law presumes that a defendant is innocent of crime, and that presumption stays until you have reached a verdict. The law permits nothing but legal evidence presented before a jury to be considered in support of a charge. The presumption of innocence is enough in itself to acquit a defendant unless 12 jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

I will say a few words about what the law means by a reasonable doubt. A reasonable doubt is a fair doubt based on reason and

common sense arising from the state of the evidence or from the absence of evidence.

A reasonable doubt doesn't mean a doubt that a juror asserts arbitrarily or capriciously because of sympathy or because he doesn't want to perform an unpleasant task. It doesn't mean a possible doubt because we can rarely prove anything to an absolute certainty. And the law doesn't require that.

A description that is often given and it's in line with what counsel have told you is that proof beyond a reasonable doubt refers to a doubt such as would make you hesitate to act in your own important affairs. And you do that as you go through life you have to decide things like marriage, school selection, house purchase, other important matters, and after listening to a lot of different people, you make up your own mind. And a reasonable doubt is a doubt such as would make you hesitate to act in your own important affairs.

This proof beyond a reasonable doubt operates on the whole case. It doesn't

mean that each bit of evidence must be proved beyond a reasonable doubt. It means that the sum total of all the evidence, direct and cross for both sides, must satisfy you beyond a reasonable doubt as to each element of the crime charged or else you must acquit.

Finding a person to be guilty of a felony is a serious matter. And you can consider that fact in determining whether there is a reasonable doubt.

But if you are convinced beyond a reasonable doubt, it's your duty to convict, just as it's your duty to find a verdict of not guilty if you have a reasonable doubt at the end of all your deliberations.

An indictment, as I said at the beginning, is just a formal method of accusing a defendant of crime. It's not any evidence that any defendant did anything. It doesn't permit any inference of guilt.

The four defendants have pleaded not guilty. The indictment and these pleas create the issues which you must decide.

The law never imposes a duty on a

defendant in a criminal case to produce any evidence. He can take the position that the Government hasn't carried its burden of proving his guilt beyond a reasonable doubt.

A defendant has a constitutional right to testify or not to testify as he sees fit. If he doesn't testify, it's no evidence of any kind of guilt or wrongdoing. You are not to consider or discuss the fact that a particular defendant chose not to testify, and you shouldn't even mention it in your deliberations.

We have had three defendants who did testify. Their testimony must be weighed just like that of any other witness. You can consider that a defendant, if he is guilty of crime, has a motive to lie to protect himself. But you also consider that when he gets on the witness stand he is subject to cross examination and a lot of matters can be brought up and he runs a risk. And so you determine the weight that you will give to the testimony of a defendant as part of all the proof in the case.

When you are analyzing the evidence you can draw reasonable inferences from the

evidence based on your own common sense and general experience. You are not confined to the bare bones of the evidence, but you can't speculate. You can only draw inferences from facts that you find have been proved.

The indictment in this case charges that in or about August, 1972 and in the Eastern District of New York, the defendants Thomas Buttafuoco, Jesse Pearson, Anthony Polito and Patrick Rayll, together with Ira Kirschner, not named as a defendant herein, wilfully and unlawfully received and concealed a quantity of stolen Colgate-Palmolive articles, of a value of approximately 110,000 dollars, which articles were moving as a part of and constituting interstate commerce from Elizabeth, New Jersey to Plainville, New York, knowing the same to have been stolen.

The indictment is based on section 2315 and section 2 of the United States Code.

And section 2315 says that whoever receives, conceals, stores, barters, sells or disposes of any goods, wares or merchandise, securities or money of the value of $5,000 or

more, moving as or which are a part of interstate or foreign commerce, knowing the same to have been stolen, shall be fined or imprisoned.

And I don't go into the amount of the penalty because that is for me to determine at the conclusion of the case if there is a guilty verdict on the basis of all the facts that may have been presented to me by counsel and probation at that time.

The indictment also refers to section 2 of Title 18 which says: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

That means that somebody who helps commit a crime is just as guilty as the one who does it personally provided that he knows what he is doing.

One of the rules that is given with respect to that by the Supreme Court is that a defendant to be guilty of aiding and abetting must in some way associate himself with the venture, participate in it as something

that he wishes to bring about, that he seeks by his actions to make it succeed.

In order to find that a defendant is guilty of receiving or concealing goods stolen from foreign commerce, there are five elements that must be proved by the Government, each beyond a reasonable doubt. First, that there was a stealing or unlawful taking.

Second, that the goods were moving as part of an interstate shipment.

Third, that the defendant received or concealed the goods.

Fourth, that he knew they were stolen.

And fifth, that they were worth more than $5,000.

I will go briefly into the application of these elements to the facts that have been the subject of testimony.

The stipulation of facts in the case simplify the issue by substantially removing any dispute on three of the elements. There is a stipulation that a witness, if called to testify, would say that a truck containing Colgate merchandise was stolen on or about

August 28th, 1972, and that that was the truck that came to Long Island, which would be an interstate shipment, and that the contents were worth more than $5,000. The Government doesn't have to prove that it was worth $110,000 as stated in the indictment. It merely has to show the statutory amount of $5,000 or more that was involved.

So if you accept those facts, you can find three of the elements: that there was a stealing; that there was interstate shipment; and that the goods were worth more than $5,000.

With respect to the receipt or concealment: receipt involves something in the nature of possession. And so we use a definition of possession.

The law recognizes two kinds of possession: actual possession and constructive possession.

A person who knowingly has direct, physical control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession has the power and the intention to exercise control over a thing either directly or through

another person is then in constructive possession.

Possession may be sole or joint. Two or more persons can share actual or constructive possession of a thing. So that it would be possible, if you find it for all four of the defendants to have been in possession and to have taken part in the receipt and concealment of these goods, if you find beyond a reasonable doubt that they were present in the IMK warehouse on the evening of August 28th.

It's not necessary to prove that the defendants knew the property was stolen from a foreign shipment. It's enough to be shown that the property was stolen. But here the probability is that if they knew it was stolen, they knew it was from a foreign shipment.

In determining whether the defendant had knowledge, you should consider all the facts and circumstances in the case. Possession of stolen property shortly after it was stolen without a reasonable explanation of possession, permits the inference that the defendant knew the property was stolen. But it does not

Charge

require a finding of knowledge.

So if the goods were stolen in the afternoon of August 28th, and they were in the possession of these defendants later on in the evening on August 28th, you can infer that they knew they were stolen. But you don't have to infer it. And you bear in mind that a defendant doesn't have to bring out any testimony. The explanation may come from other matters.

Knowing they were stolen involves an element of knowledge, and knowledge is a state of mind. The burden is on the prosecution to prove this state of mind which is encompassed in the words, "knowing the same to have been stolen."

A person doesn't knowingly do a wrongful act if the act results from a mistake or from any other innocent reason. If the defendant had good intentions, he cannot be guilty of a crime. But he cannot deliberately close his eyes to facts which point toward knowledge of theft.

A difficult aspect of your duty is to

determine the credibility of witnesses before you and to weigh their testimony. And in weighing their testimony, some of the facts you can consider are a witness' bias, his interest in the outcome of the case, his manner while testifying, his candor, whether he looks and sounds honest, his intelligence as you have observed it, and the extent to which he was in a position to know the facts he has testified about.

You can also consider the extent to which any testimony has been corroborated or contradicted by other evidence. You can consider inconsistencies within the testimony of any witness, either on direct examination or on cross examination, and whether any witness has changed his testimony.

If you find that there has been a prior statement that is inconsistent with trial testimony, you should weigh that and determine what effect it has.

A witness may have been mistaken with respect to part of his testimony and be accurate with respect to other parts. And

you can consider whether any misstatement is material or intentional. Where you find that a witness said something that is not true, either as a deliberate lie or because he is not careful in what he says or doesn't recall, you can decide that you are not going to believe anything he says, or you can decide,"well, I know he was wrong on that, but there are facts that bear him out on the others," and it's within the province of the jury to determine how much of a witness' testimony to believe where there are untruths or where there are inconsistencies.

(continued on the next page.)

We have had some -- one Government witness at least testified in the case. You are not to give any greater weight or credibility to the testimony of a witness solely because of the fact that he is a Government agent. You are not to give it any less weight. You evaluate the testimony of a Government agent in the same manner as you would evaluate the testimony of any other witness.

We have four defendants here. You are to consider the case separately with respect to each defendant. The issue of guilt or innocence is personal to each verdict. And your verdict as to one defendant is not to be affected as to the other defendants. In your deliberations you consider only the evidence that relates to each defendant.

Now, we have what is called accomplice testimony here. Mr. Kirschner testified that he knew he was getting stolen goods. That makes him an accomplice. Somebody who participated in criminal transactions that are the subject matter of the case.

When you evaluate the testimony of an

accomplice you should consider that testimony with caution and receive it and evaluate it with great care. The fact that a witness has admitted that he has committed a serious crime may show a defect in his character, may make him more likely to lie than other people. And if he is going to try to avoid prosecution he may try to court the favor of the prosecution by implicating the defendants on trial. And you can consider all that.

You consider also the extent to which Mr. Kirschner's testimony is corroborated or contradicted by other evidence. The law doesn't require that accomplice testimony be corroborated. You can decide a case solely on the testimony of Mr. Kirschner if you believe it beyond a reasonable doubt. But you should consider all the facts in the case and the extent to which they bear out or fail to bear out what he said, the extent to which has been corroborated by other witnesses or by exhibits or other evidence.

And I mention motive. You can bear in mind that Mr. Kirschner has not been indicted in this case, although he committed a crime, in

determining whether that constitutes a reason to disbelieve his testimony about the other defendants or whether weighing it all you still find that there is sufficient evidence of guilt.

Now, there are a few other rules that apply here. One is what we call false exculpatory evidence. There was testimony by Mr. Polito that he didn't know Mr. Pearson, and by Mr. Pearson that he was down in North Carolina at the time that this took place. And the Government tried to show that those facts were not true.

Statements made by a defendant may be considered in the light of all the other evidence in the case in determining guilt or innocence. When a defendant offers an explanation or makes a statement tending to show innocence, and the explanation or statement is later shown to be false, the jury may consider whether this is circumstantial evidence pointing to consciousness of guilt.

Ordinarily it's reasonable to infer an innocent person wouldn't find it necessary to invent an explanation tending to establish his

innocence. But whether or not a statement is true or whether or not it's false, if it isn't true, points to guilt, it is a matter exclusively within the province of the jury, always bearing in mind that there is no duty on a defendant in a criminal case to call any witnesses or produce any evidence.

We have had character testimony here. And there is a rule with respect to that which I will read you.

Where a defendant has offered evidence of good general reputation for truth and veracity -- and really it is not character testimony. It's reputation, although we call it character testimony.

Where a defendant has offered evidence of good general reputation for truth or veracity or as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case.

Evidence of a defendant's reputation inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt

since the jury may think it's improbable that a person of good character in respect to those traits would commit such a crime.

Now, we had some business records that were offered here, too. And there is a special rule with respect to those.

Whether Mr. Pearson was in North Carolina on August 28th or on August 31st may depend on the weight that you give to the documents which Mr. Joyner brought here, which was a photocopy of a shipping document with the date 8/31 on it.

The statute says that a memorandum may be received in evidence if it was the regular course of business to make such memorandum or record at the time of such transaction, occurrence or event or within a reasonable time thereafter or other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight. But such circumstance shall not affect its admissibility.

In other words, you can consider that in determining whether the fact that Mr. Joyner didn't make the note himself and had only a supervisory

capacity casts doubt on it and what effect that has on the truth of Mr. Pearson's statement.

Now, a federal judge is permitted to comment on evidence providing he makes it clear that the ultimate decision rests with the jury. And I have found that one of the ways that I think I can be helpful after you have heard argumentative presentations from both sides is to give a chronology which tells the story as I have noted it in order instead of argumentatively.

Back in 1968 Mr. Kirschner and Mr. Buttafuoco met at Floyd Bennett Field where they both were engaged in business. In 1969 or 1970 Mr. Polito met Mr. Rayll, according to Polito's testimony. And there was some testimony by him that Mr. Rayll used to come to the pier, that he thought he was in the plastics business.

Mr. Buttafuoco said he met Kirschner again in the summer of 1971 and bought some toothpaste from him, and that he took Rayll to meet Kirschner in November of 1971, and Rayll bought candy and radios, things which Mr. Kirschner denied.

There is evidence that on December 10, 1971,

Mr. Buttafuoco bought three radios from Mr. Kirschner and paid for them with a check. And Kirschner originally said, "I never sold any radios. I just cashed a check."

And finally he said, "I don't recall whether it took place or not."

And that is one of the instances where you may determine that Mr. Kirschner told an untruth. And you will have to decide, if you do believe that, whether that affects all his testimony or whether you think he was just trying to cover himself on that, and the rest of what he said may nevertheless be true.

Buttafuoco said that he went with Rayll to Mr. Kirschner in February of 1972 to talk about the complaint -- he thought it was a complaint on the radios.

(Continued on next page.)

THE COURT: (Continuing.) Mr. Kirschner said the first time after 1969 that he met Buttafuoco was in June of '72, in Plainview, when they talked about how good the trucking business was and either how bad Kirschner's business was, or how good it was, as Mr. Buttafuoco said.

And it was June 20th, 1972, according to the documents, that Mr. Buttafuoco bought a Volkswagen from Mr. Polito, whom he said he had not known before but met through Mr. Rayll.

Kirschner says Buttafuoco brought Rayll to the warehouse in July of '72, as a man who could do you some good, and they looked over the warehouse and that Rayll made some inquiries, and that late in July Rayll brought Polito around and Kirschner said that's the first time he met him and he talked about the trucks and the good load.

Polito says that this was not in the daytime, that he went at night to see Mr. Kirschner, during July, to talk -- to discuss a loan.

There is no evidence -- no testimony that the loan was ever made, so if they did discuss it, it probably was not made.

In August of '72, Kirschner testified that

in the early part of the month, middle of the month, Rayll said he had had a load and he couldn't reach Mr. Kirschner but he'd try again.

And then we come to August 28th, when there were a whole lot of things that happened. There was a phone call from the Rayburn telephone number to the Schiavone-Fitzpatrick telephone number at 12:55 P.M. on that day. That's Mr. Polito's office, but there is no evidence that he was there.

At 5 o'clock, a truck was stolen from the Jones Trucking Company yards.

At 5:30 there was a toll call from Mr. Polito's number to Mr. Buttafuoco's office.

At 6 o'clock Mr. Kirschner says there was a phone call to him at his warehouse from Mr. Buttafuoco, that Tony was coming, and while Mr. Kirschner says it's no good coming at night, his testimony is that he did come.

At 6:30 Mr. Kirschner said he had a phone call from Rayll asking if he had heard from Tony and he said he hadn't heard yet.

The telephone toll records indicate that at 6:38 a call from Rayll to Polito's home in New Jersey; at 6:50 from Rayll to IMK and at 7:01 another call,

to Polito's home.

At 7 o'clock Mr. -- about 7, Mr. Kirschner said he had a phone call from Polito that he was in New Jersey and was going to bring a load.

There was some comment about Mr. Schlam's statement that Mr. Polito was calling from the Rayburn yard and that he was with the truck in the yard.

I think he was asking you to draw that inference from the fact that he said he was in New Jersey, but I do not think the testimony showed where in New Jersey he was at that time.

According to Mr. Kirschner's testimony, he was at Mr. Rayll's home from 7 until about 9 o'clock and when he got back to the warehouse around 9, Mr. Buttafuoco drove up almost immediately in a Cadillac.

Mr. Buttafuoco said he had a Cadillac but he did not drive the Cadillac that night. He was driving an old -- I do not know whether a Chevy, but an old small car. And almost immediately thereafter, according to Mr. Kirschner, a forty foot trailer drove up with Mr. Polito and Mr. Pearson in it, and they unloaded about 4300 cases on palletts and took about five hours to do it.

Well, that means they would have been doing about 800 cases an hour, by hand, without a fork lift and with this pallett jack that Mr. Kirschner told about, if they did it.

There was a telephone call from IMK to Mr. Polito's residence at 10:50 that night, according to the toll records. Mr. Polito says, well, that is because I had an appointment there and I did not show up and Mr. Kirschner must have been calling to find out why I was not there.

You can determine whether that is a fair explanation and whether it supports Mr. Polito's statement that there is no credible evidence that he was there at that time.

Now, about 2:30 A.M., according to Mr. Kirschner, Tony Polito left after inquiring about all night diner and Mr. Pearson was with him in the truck, and there is a telephone toll message at 3:34 A.M., from Mr. Pearson's home in New Jersey to Mr. Berrico, who was described as one of the dispatchers for Rayburn.

Mr. Pearson testified that he left 5 o'clock Sunday night, August 27th, for Rocky Mount, North Carolina; it was a fourteen hour drive; that he

arrived there 8 or 9 o'clock and had to wait until 11 o'clock or so before he unloaded his truck.

He said he did not get a receipt, although Mr. Joyner said that it was the practice to give receipts to the truck drivers when they brought things in.

And Mr. Joyner says that the only truck that arrived -- there wasn't any truck on August 28th, there was one on August 29th, from Coastal Trucking, and that a Colgate load arrived on August 31, and he does not know whether Mr. Pearson was there or not. He did not identify the signature particularly.

Now, August 29th, Mr. Kirschner says he started to tidy up his warehouse, make an inventory of what he said he had bought the night before, and he told his employees when they asked him where did all these goods come from, none of your business.

And later in the day he called Mr. Ertman in Bayshore and he says Mr. Ertman agreed he would pay him $5,000 cash and $5,000 a week until he paid a discount price for all the goods that were going to be -- that were found there, which they had not yet counted.

Mr. Pearson said that on -- no. On the evening of August 30th, Mr. Kelly, the agent, looked into the warehouse, over the window, and he saw goods stacked up there, apparently more in order than they were described as having been on the night of the 28th, when they were unloaded.

Mr. Pearson says that on August 31, he started down to North Carolina the second time with his second load.

That same day, 8 o'clock, August 31, Mr. Kirschner got to his warehouse and began to unload and Mr. Ertman got there very promptly thereafter and they had three trucks, one of -- belonging to each of them, and a rental truck and they figured it would take about two trips to do it all.

Mr. Kelly started watching them, at least as early as 9:30, and waited until he got a search warrant. Then about 12:30, he and eight or ten agents swooped in and they arrested Mr. Kirschner and all the folks who were with them and took them to the magistrate and had them booked and then took Mr. Kirschner to the FBI.

He got back to his warehouse about 7:30. He says he told the FBI at that time the same thing

that he told on the witness stand here.

On the first of September, which I think was a Friday, Mr. Kirschner testified that Mr. Rayll called in to find out what progress they were making in selling and Mr. Kirschner said, "I've been arrested, it's not going so well."

On September 26th, which is something over three weeks later, Rayll was arrested at his home and Polito was arrested and I think Mr. Buttafuoco and Mr. Pearson were probably arrested at the same time, not by Mr. Kelly.

We did not have any testimony by the arresting officers, and you can judge whether the delay in arresting them is any indication that the story was a fabrication by Mr. Kirschner and what effect you are going to give to that delay. There is no testimony with respect to it.

(Continued on next page.)

Notes follo

Buttafuoco GR/rp 2PMR2

1 Charge

THE COURT: (Continuing) A year later, December 6, 1972, the charges against Ertman and Mr. Kirschner's two employees were dismissed by the Magistrate. They were never indicted.

March of 1973, March 7th of 1973, Mr. Kirschner was in Mr. Schlam's office with a lawyer and he got a letter promising him immunity.

Now, this is not the normal type of immunity. The statute provides that if a witness will not testify, he can be brought before a Judge and the Judge can sy, "I will grant you what is called testimonial immunity. You have to testify but nothing that you say can be used against you." Well, that would not have done Mr. Kirschner much good, I suppose, because they had caught him redhanded. They did not need his testimony to help. So he got from the prosecutor a promise not to prosecute.

Now, prosecutors have discretion whom they are going to indict and you can determine whether the promise not to indict was such an inducement that it led Mr. Kirschner to thrash out at some people who were not guilty and

accuse innocent people. But a prosecutor has a right to make his selection as to whom to indict and you can't just say, "I do not like a witness to be granted immunity." You can determine that you will not believe him but you cannot say, as a matter of policy, "I am not going to listen to that kind of testimony." And just a few more things, general remarks.

There was testimony by Mr. Buttafuoco that he got together with Mr. Polito and Mr. Rayll and they tried to match their stories.

Now, that can be an innocent remark or it can color your attitude toward their testimony. You can decide on that.

Mr. Polito said he could not have been at Mr. Kirschner's in the daytime as was testified because he always worked eight hours a day. And that is one of the issues on which Mr. Schlam brought in witnesses. He brought in Mr. Cavico and Mr. Zeyock, who at that time owned Jones Trucking Company, to say that they had seen Mr. Polito at Rayburn Warehouse in the daytime and that they had seen him with Mr. Pearson, contrary to both their testimony that they did

not really know each other.

Mr. Polito said, "I never met Mr. Pearson," before they were arrested and he had never been at Rayburn in the daytime. And later he said, "Well, I cannot really tell. All Negroes look alike to me." And that may be true. I have heard the remark before. You can determine whether he was stating a truth or that he is just trying to hedge and make sure that he was not making an absolute denial.

Mr. Pearson said he never saw Buttafuoco, Polito or Rayll before this case. And if that is true and he was not there that night, consider that as a ground for dismissing as to him.

Now, Mr. Rayll's contention is not exactly as Mr. Schlam described it. I think Mr. Schlam was covering what other counsel had said before Mr. Wales came back into the room this morning, where there was an effort to give a motive for Mr. Kirschner to lie with respect to each of the defendants.

Mr. Rayll's contention is that the only evidence connecting him to the stolen goods is the testimony of Ira Kirschner, that Ira Kirschner's

testimony has not been corroborated as it applies to Rayll, that Kirschner's testimony is not credible because it comes from a tainted source, from seombody who admits that he dealt in stolen goods and who was not indicted in this case and has every motive to shift some of the blame in this case to others.

There was a reference to fingerprints. There is not testimony in the case about fingerprints as to whether you can get them off the cases or why not or what affect it is. You are going to decide the case on the evidence before you and nothing else.

You can also decide on the absence of evidence, so you may give some consideration to that, if you determine it.

I think I might add, Mr. Pearson claims there is no testimony by Mr. Kirschner that Pearson knew the other people, except as he may have been there on that evening. And Mr. Kirschner's identification of Mr. Pearson may be a little more questionable than his identification of the others because the others he had met several times, according to his testimony. Mr. Pearson

he said he met only that night. Although he was there for five hours. He did say that he was positive about it.

Now, whatever I have said does not indicate that I am expressing any opinion on guilt or innocence. I have tried to lay the facts before you and let you judge them as judges and on your recollection of the testimony.

Now, with respect to reaching a verdict, when you go to the Jury Room, Mr. Rodder, who is Juror No. 1, will be the foreman. He should try to see that everybody gets a chance to talk, that not too many people talk at once, and guide you in determining when you begin to take votes as to guilty or not guilty.

During your deliberations, you should each assume the attitude of judges of the fact, not partisans or advocates sticking up for one party or the other. Acting as judges, you will be making a high contribution to the administration of justice.

In determining guilt or innocence of the defendants you are not to give any consideration to the matter of punishment. This is exclusively

my responsibility, if there is a verdict of guilty. I say your recollection of the evidence governs.

If you want some of the testimony repeated, this testimony has been transcribed and you can request some of it to be read and I will call you into Court and get counsel and parties together and have it read to you.

If you want any of the exhibits that have been received in evidence, you can ask for them. Some have just been marked so that the witness could look at them without being put in evidence.

There will be a Marshal available outside the Jury Room. You can report when you have reached a verdict or he will let the Court know if there are any questions you want to have answered.

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Charge

THE COURT: (Continuing) You are each entitled to your own opinions. Nobody should reach a decision that is not his own. You should change views, however, with your fellow jurors, listen carefully with each other, not hesitate to change your initial opinion if you are convinced that somebody else's analysis of the facts is better.

But any verdict must be unanimous. All twelve must agree and no juror should give up a conscientious belief in guilt or innocence in order to reach a verdict. Counsel have a right after I have completed my charge to take exceptions and point out things that I have omitted or misstated.

I may call you back, if there are things that require that. Otherwise, you will be at your job presently. I will have to excuse Mrs. Brown. We have needed one alternate. Fortunately, we did not need two.

Thank you for being here. You can get whatever wraps you have in the juryroom and then get your card from Mr. Giokas and go back downstairs, just report. I don't think you will be

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needed this afternoon.

Now, your oaths sum up your duty. That is, without fear or favor to any man, you will well and truly try the issues between these parties, according to the evidence given you in court and the laws of the U. S..

I will ask the Clerk now to swear the Marshal.

(One male Marshal duly sworn by the Clerk of the Court.)

THE COURT: Will you take this form of verdict and give it to the foreman.

THE MARSHAL: Yes.

THE COURT: All right. You may retire.

(At 2:45 p.m., the jury retired to the jury room and the following occurred in their absence.)

THE COURT: All right.

Mr. Schlam, are there any exceptions?

MR. SCHLAM: No, your Honor.

THE COURT: Mr. Currato?

MR. CURRATO: The defendant Buttatuoco has no exceptions and no requests.

THE COURT: Mr. Verdiramo?

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MR. VERDIRAMO: No exceptions, your Honor.

THE COURT: Mrs. Seybert?

MRS. SEYBERT: None, your Honor.

THE COURT: Mr. Wales?

MR. WALES: Yes, I do, your Honor.

THE COURT: All right.

MR. WALES: I except to your Honor reading Section 2 of Title 18, the aiding and abetting section. I believe it is only confusing. Your Honor read it properly and correctly, but it is just not applicable to this particular case. This is a simple actual possession case. And it is not in any way with respect to any of the defendants an aiding and abetting case.

The testimony of Kirschner was that each of the four men on trial actually were in physical possession of the goods on the night in question and I think your Honor is -- charge could only serve to confuse them and mislead them as to the nature of the case.

THE COURT: Well, I've been over that with you before.

MR. WALES: Yes.

THE COURT: And I disagree with you.

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There were probably various degrees of culpability, if these defendants did it, as to who brought it.

Mr. Polito and Mr. Pearson were perhaps the ones who drove it there and tried to conceal it. Mr. Pearson may have had a different motive. He was just a truck driver, who may have known--

MR. WALES: Yes, but --

THE COURT: I think aiding and abetting is a proper charge.

MR. WALES: The crucial point in Kirschner's testimony, your Honor -- remember, this is not a transportation case. This is a possession case. Finally --

THE COURT: It's a receiving and concealment case. I was a little puzzled because my previous possession cases have been under Section 459. This was 2315 and I'm not quite sure what the significance is of the difference.

MR. SCHLAM: There really wasn't any significance, your Honor.

THE COURT: I think they are overlapping statutes.

MR. SCHLAM: Yes.

MR. WALES: We have a five-hour period.

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Kirschner told us about in which according to his testimony, if the evidence is to be believed, each of the five men were in actual physical possession of the jury:-- of the goods.

THE COURT: I charged joint possession.

MR. WALES: Right. That is the sum and substance of the Government's case, as charged inthe indictment. And therefore, I feel that when your Honor gives an aiding and abetting, Section 2, it just confuses the subject.

THE COURT: All right. I repeat my denial of the exception.

MR. WALES: Okay.

With respect to your Honor also charged that there are two kinds of possession, actual and constructive. Well, of course, as a matter of black letter law, I can't argue with you on that but again it's just not applicable to the case.

This is a simple actual possession case. The Government is not trying this case on the theory of constructive possession.

THE COURT: Maybe I misunderstood the request to charge on possession. I think it was

all actual possession, if there was any.

I don't see any harm in that.

MR. WALES: Well, I think harmless error is maybe something we have to worry about when we get up to the Court of Appeals.

THE COURT: I don't think it's error.

MR. WALES: Right now when your Honor has the opportunity to instruct this jury and to correct this, I think -- I think the opportunity should be availed, your Honor, not be passed up.

THE COURT: Mr. Schlam, do you have any feeling on that?

MR. SCHLAM: No.

THE COURT: I don't think that's harmful.

MR. WALES: That's all.

THE COURT: All right.

We will wait until we hear from the jury. I did not tell them, as I usually do, let me know at 5:00 or 5:30 whether they are going to want to stay over or come back tomorrow.

If they have a question I will tell them that.

MR. WALES: Off the record.

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THE COURT: Off the record.

(Discussion off the record.)

THE COURT: All right, gentlemen.

(Recess taken.)

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(The following took place in the absence of the jury.)

THE COURT: Everybody is here in the courtroom. It is 3:45. I have a jury note. It is marked court exhibit 2 which Mr. Giokas will read.

THE CLERK: "We would like to see the bill and check for the radios purchased by Mr. Buttafuoco. We want to see the check for the car and we want to see the telephone toll receipt for August 28th."

THE COURT: And I have s ent into the jury exhibits A, C and G provided by the defendants, and exhibits 4, 5, 6, 8 and 9 from the government.

I'm not sure how many other exhibits there are. Perhaps it would be good to leave them here in case there are any requests. Normally I do ask counsel to agree they go in without delay.

Suppose counsel just take a few minutes to check the exhibits, because the ones that are in evidence are the ones -- the only ones that should be provided. There aren't that many.

MR. SCHLAM: Here is 1. . Here is 3. Here is 2.

Which other numbers do you have.

THE COURT: The government has had some

photographs and the defendants had some work sheets.

THE CLERK: 10 are the documents.

THE COURT: And delivery receipts.

MR. SCHLAM: Here is another one.

THE CLERK: 18.

MR. SCHLAM: 18 are the photographs.

THE CLERK: 18 A.

MR. SCHLAM: 18. Right here.

THE CLERK: 19, shipping documents.

MR. SCHLAM: Right here.

THE CLERK: Photo of the warehouse.

MR. SCHLAM: 20. And 21.

We have them all, your Honor.

THE COURT: All right. Are there any other defendants' exhibits.

MR. CURRATO: Just those three.

THE COURT: The defendant exhibits E and F, where are they?

THE CLERK: I have them right here.

THE COURT: All right. Then we will recess again. Everybody stay around. We don't know when the jury will call again. Stay nearby.

(Recess taken.)

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(Time noted 4:20 P.M. o'clock.)

(The following took place in the absence of the jury.)

THE COURT: All right, we are waiting for Mr. Schlam.

(Whereupon, Mr. Schlam entered the courtroom.)

THE COURT: Mr. Schlam, I have a note from the jury with a request to recess for the day, asking what time do we report tomorrow.

I have never excused a jury this early, but I will see if they think that they can reach a verdict by staying another hour, and if no I will let them go.

MR. SCHLAM: Well, I certainly understand their point. I would just as soon recess myself.

THE COURT: All right. Bring them in.

(Whereupon, the jury entered the courtroom.)

THE COURT: Mr. Rodner, I have your note saying that you request a recess for the day.

FOREMAN: Yes sir.

THE COURT: And it brought up an interesting question that I never thought of, which is why we keep jurors when they are deliberating later than

when they are listening to testimony. I suppose the reason is that when you are in the process of a trial lawyers always have something to do after 4:30 to get ready for the next day. And when it's in the hands of the jury, you're doing all the work and they want to get it decided.

Do you think if you stayed for another half hour or so you would decide it tonight.

FOREMAN: I think that is impossible, your Honor.

THE COURT: All right. Normally, I have juries stay until 5 or 5:30. But if you want to take a recess for the day -- you think that won't do it.

FOREMAN: I don't think -- the reason why we came to that conclusion was because I don't think that we can come to any kind of a decision today.

THE COURT: All right. And I suppose some of you may have made plans figuring we do end at 4:30 usually.

Now, of course, tomorrow morning, could you all get here at 9:30.

FOREMAN: Surely.

THE COURT: Suppose you report at 9:30.

Do they have to go downstairs?

THE CLERK: If they want to.

THE COURT: All right. You can come straight here at 9:30. Don't begin talking about the case until all twelve are here because the deliberations are by all twelve people.

You are at a crucialstage now. In the old days jurors used to be kept without food or heat until they reached a verdict.

FOREMAN: That's punishment.

THE COURT: And if the Judge rode on a circuit they were carried around in a cart behind him. We trust you now not to talk about the case among yourselves or with anyone else. Don't do any private investigation. Remember, it's an important matter. You have heard the evidence. You have heard the arguments. You have heard my instructions. And that's what is supposed to guide you.

Come back at half past nine and we will be ready for whatever questions or report you have to make.

FOREMAN: Thank you very much.

THE COURT: Mark this as a court exhibit

Certificate of Service

March 14, 1974

I certify that a copy of this brief and appendix has been mailed to the Acting United States Attorney for the Eastern District of New York.

Clyde Loop Sandberger